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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

BARRY GILTON, et. al.

Defendants.

No. CR 13-0764 WHO

NOTICE OF MOTION AND
MOTIONS IN LIMINE

DATE: June 17, 2016

TIME: 9:00 a.m.

COURT: Hon. William H. Orrick

TO: BRIAN STRETCH, ACTING UNITED STATES ATTORNEY, AND TO
ASSISTANT UNITED STATES ATTORNEYS, DAMALI A. TAYLOR,
WILLIAM FRENTZEN, AND SCOTT JOINER:

PLEASE TAKE NOTICE that on the date set above, defendant BARRY
GILTON, through counsel, will request that the Court enter an order excluding
from evidence, the following:

- 1) Copy of Bible Page (Government's Exhibit List #991);
- 2) Any and all evidence of any uncharged act, including those listed in
the United States' Consolidated Statement Regarding Additional Acts
the Government Intends to Introduce at Trial (Docket Document
#851);
- 3) Any and all mugshots (including those listed in the Government's

Exhibit List #'s 85, 466, 467, 554, 590, 591, 592, 603, 1086, 1210, etc.);

- 4) Any and all evidence relating to or referencing Michael Northcutt. (Government's Exhibit List #'s 27, 226, 227).

This motion is made on the following grounds that the foregoing evidence is not relevant, lacks foundation, constitutes hearsay, does not satisfy the standard for admissibility of other acts evidence, not probative of any material issue and would be unduly prejudicial, confuse the issues, mislead the jury, lead to undue delay, waste of time, and needless presentation of cumulative evidence.

This motion will be based upon the memorandum of points and authorities filed herein, upon such documents and records as are contained in the court's files, and upon such evidence and arguments as may be presented by counsel at the hearing of this motion.

POINTS AND AUTHORITIES

A. MOTION IN LIMINE TO EXCLUDE COPY OF BIBLE PAGE (GOVERNMENT EXHIBIT LIST 991)

During the execution of a search warrant on June 9, 2012 at Mr. Gilton's home at 35 Jennings Court in San Francisco, officers found a closed Bible lying on top of a nightstand. Officer Braconi testified during the preliminary hearing that he opened to a Bible page that was "folded over specifically" and read its contents. (Exh. A, p. 354). Sgt. Braconi then photocopied the Bible page and highlighted the following passage with a yellow highlighter:

And Reuben answered them, saying, Spake I not unto you, saying, Do not sin against the child; and ye would not hear? therefore, behold, also his blood is required.

(Exh. A, p. 355; Exh. B). The court should exclude this photocopied Bible page because it lacks foundation, has been altered, and violates the best evidence rule and the rule of completeness.

The government cannot establish that the Bible page is relevant to any of the defendants because it cannot establish the necessary foundation connecting

1 them to the relevant passage. Presumably, the government intends to introduce the
2 Bible page as evidence of the motive for Sneed's killing. The fact that the page
3 was "folded over specifically" makes it relevant because it evidences the actor's
4 state of mind; it reflects the actor's acceptance or belief in the applicability of the
5 passage. ***But who folded over the page?*** Whose state of mind is being proven?
6 The Bible was found on a nightstand in Mr. Gilton's and his wife's bedroom. The
7 government could not establish to whom the Bible belongs, but most importantly,
8 it could not establish the identity of the person who specifically folded over the
9 page. The government could not establish that Mr. Gilton folded over the page, or
10 that he even has knowledge of the contents of that page. Without this necessary
11 foundation, the Bible page is not relevant to Mr. Gilton, or any of the other
12 defendants for that matter.

13 Without identifying who folded over the page, mere possession of the Bible
14 is not enough to impute the passage to Mr. Gilton. *See, United States v. Ordonez*,
15 737 F.2d 793, 800-801 (9th Cir. 1983) (ledger entries inadmissible as corpus delicti
16 to show possession of cocaine for distribution; government was unable to identify
17 author, and mere possession of document insufficient to show adoption of its
18 contents). Moreover, the act of folding over the page constitutes nonverbal
19 conduct under Fed. R. Evid. 801(a) and subject to the hearsay rule. The passage
20 shows motive for Sneed's killing only because the act of folding over the page
21 reflects the actor's acceptance or belief in the relevance of the passage. It
22 constitutes an intended assertion by the actor regarding his belief in the validity of
23 the passage—indeed, the folded page was to tell himself that it was significant. On
24 that basis, folding over the page constitutes nonverbal conduct under Fed. R. Evid.
25 801(a) and subject to the hearsay rule. *See, e.g., White Industries, Inc. v. Cessna*
26 *Aircraft Co.*, 611 F.Supp. 1049, 1076 (W.D. Mo. 1985) (a secretary's collection of
27 files in response to a request by her supervisor "reflect[ed] her belief that the files
28 she gathered were those requested; they represent[ed] her intended assertion to Mr.
Tumbleson that they were"). Unless the government establishes the declarant's

1 identity by showing who folded over the page, the government could not establish
2 the necessary foundation for non-hearsay under Fed. R. Evid. 801(d)(2) or any
3 exception to the hearsay rule. *See, United States v. Mouzin*, 785 F.2d 682, 692 (9th
4 Cir. 1986) (having failed to show who authored the ledger, the government failed
5 to establish the proper foundation for non-hearsay under 801(d)(2)).

6 The Bible page is further inadmissible under Fed. R. Evid. 1003. Under
7 Section 1003, a duplicate is admissible unless a genuine issue regarding
8 authenticity exists or that it would be unfair, under the circumstances to admit the
9 duplicate. *United States v. Childs*, 5 F.3d 1328, 1335 (9th Cir. 1993) (duplicates
10 allowed where no signs of alteration or tampering by law enforcement occurred);
11 *United States v. Skillman*, 922 F.2d 1370, 1375 (9th Cir. 1990) (duplicate admitted;
12 no genuine issue of authenticity); *United States v. Smith*, 893 F.2d 1573, 1579 (9th
13 Cir. 1990) (no genuine issue as to authenticity and no alteration). Here, both issues
14 exist. There is a genuine issue as to authenticity because Sgt. Braconi altered the
15 copy by highlighting a passage. The reason that the page was folded over may
16 have nothing to do with the passage, yet the highlighting would draw the jury to
17 the passage. It would be unfair, under the circumstances, to admit the duplicate.

18 Finally, the Bible page should be excluded under Fed. R. Evid. 403.
19 Admission of the Bible page requires admission of the entire Bible under the rule
20 of completeness, which provides that “[w]hen one party has made use of a portion
21 of a document, such that misunderstanding or distortion can be averted only
22 through presentation of another portion, the material required for completeness is
23 ipso facto relevant and therefore admissible.” *Beech Aircraft Corp. v. Rainey*, 488
24 U.S. 153, 172 (1988); Fed. R. Evid. 106. The passage highlighted by Sgt. Braconi
25 suggests that the Bible commands avenging a child by killing the wrongdoer.
26 However, the passage is completely taken out of context because the Bible does
27 not in any way advocate revenge killings or anything of the sort. In the context of
28 the page itself, it is arguable whether the passage is advocating revenge killing.

1 Thus, the passage is misleading and confusing. As the page shows, it is difficult to
2 read and understand, is subject to interpretation, and would require time spent
3 regarding its proper interpretation. Any probative value that the Bible page may
4 have, especially when no one knows who folded over the page, would be
5 substantially outweighed by the danger of unfair prejudice, confusion of the
6 issues, misleading of the jury, and waste of time.

7
8 **B. MOTION IN LIMINE TO EXCLUDE ANY AND ALL UNCHARGED CONDUCT,**
9 **INCLUDING ALL THOSE SET FORTH IN THE UNITED STATES' CONSOLIDATED**
10 **STATEMENT REGARDING ADDITIONAL ACTS THE GOVERNMENT INTENDS TO**
11 **INTRODUCE AT TRIAL (DOCUMENT 851)**

12 This Court should exclude the government's long list of uncharged acts that
13 it intends to introduce at trial set forth in Docket Document #851, none of which
14 has anything to do with the defendants going to trial or the charged crimes.
15 Although the government in a conspiracy case may submit proof of acts not
16 included in the indictment, they must be within the scope of the conspiracy and
17 "inextricably intertwined" with the crime charged. *United States v. Lillard*, 354
18 F.3d 850, 854 (9th Cir. 2003) (finding theft of cocaine was committed as part of a
19 single criminal episode with charged offense of conspiracy to distribute cocaine);
20 *United States v. Montgomery*, 384 F.3d 1050, 1061-1062 (9th Cir. 2004)
21 (transactions "inextricably intertwined" with conspiracy because each occurred
22 within its temporal scope and comprised the conspiracy); *United States v.*
23 *Williams*, 989 F.2d 1061, 1070 (9th Cir. 1993) (finding no abuse of discretion
24 where district court admitted evidence of "uncharged transactions" that were
25 "closely linked to" events charged in drug conspiracy). The government has the
26 burden of demonstrating that the proffered evidence satisfies these requirements.
27 *United states v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994); *see also State of*
28 *Arizona v. Elmer*, 21 F.3d 331, 336 (9th Cir. 1994) ("We have emphasized
consistently that evidence of extrinsic acts may not be introduced unless the
government establishes its relevance to an actual issue in the case").

The government could not meet its burden because the uncharged acts it

1 seeks to introduce in this case are not “inextricably intertwined” with the charged
2 crimes. Evidence is “inextricably intertwined” if it “constitutes a part of the
3 transaction that serves as the basis for the criminal charge” or “was necessary to ...
4 permit the prosecutor to offer a coherent and comprehensible story regarding the
5 commission of the crime.” *United States v. Vizcarra-Martinez*, 66 F.3d 1006,
6 1012-13 (9th Cir. 1995). To constitute part of the crime charged, the other acts
7 cannot be “removed in both time and circumstance” and must be part of a “single
8 criminal episode.” *Lillard*, 354 F.3d at 854 (uncharged act part of single criminal
9 episode of charged conspiracy); *Montgomery*, 384 F.3d at 1061-62 (acts within the
10 temporal scope of conspiracy). Here, the long list of uncharged crimes do not
11 “constitute[] a part of the transaction that serves as the basis for the criminal
12 charge,” but instead constitute unrelated crimes removed in both time and
13 circumstance. As the following examples show, the government seeks to introduce
14 unrelated crimes committed by other people during remote dates:

- 15 • Evidence regarding the October 18, 2011 murder of Donte Levexier by
16 defendants Ferdinand, Gordon and unindicted CDP member Vernon
17 Carmichael;
- 18 • All evidence and communications (e.g., text messages, Facebook,
19 Instagram) concerning defendant Young persuading, inducing, enticing and
20 coercing individuals to engage in prostitution – including individuals under
21 the age of 16;
- 22 • Evidence that in or around 2007, unindicted CDP member Leon Parker
23 persuaded, induced, enticed and coerced a 16 year old to engage in
24 prostitution;
- 25 • Evidence from *U.S. v. Cheeves and Elmore*, CR09-1030 CRB
- 26 • Evidence regarding the attempted kidnapping of a prostitute by defendant
27 Robeson;
- 28 • Evidence from *U.S. v. Gregory Walker*, CR10-0772 WHA;

- Evidence concerning the pimping of a 15 year old minor and others by defendant Young;
- Recorded conversations wherein defendant Young discusses various crimes
- Evidence that from on or around September 23, 2011 through October 5, 2011, defendants Harding and Gordon committed a series of robberies (including evidence of those specific robberies).

(Exh. C, Document 851).

In its December 30, 2015, order, this Court grouped this case into two trials, noting that “with a smaller number of defendants in each reduces any potential prejudice and may obviate any *Bruton* issues.” The court was “tentatively inclined to have six defendants in the first group, including the four defendants allegedly involved in the Sneed murder” and “defer[red] ruling on William’s motion to sever the Sneed murder group from the rest of the defendants.” (Doc 758, p. 8). The uncharged crimes listed by the prosecutor have absolutely no connection to the crimes with which the first group of defendants have been charged. All of the uncharged crimes concern other individuals, not any of the defendants in the first group. None of the uncharged crimes serve as the basis for the murder of Sneed or the firearm possession charges. Evidence relating to the uncharged crimes committed by other individuals, some as far back as 2000 and 2007, are removed in both time and circumstance to the charged crimes. Rather than being part of a “single criminal episode,” they are separate crimes committed by other individuals and intended only to poison the well against the defendants going to trial.

Neither are the uncharged crimes admissible as context necessary to the jury’s understanding of the crimes charged. *See, United States v. DeGeorge*, 380 F.3d 1203, 1219 (9th Cir. 2004) (finding jury would not have understood the relevance of the transactions and concealment charged in conspiracy to commit insurance fraud without hearing evidence that defendant had previously lost three insured vessels at sea). The charged crimes relating to the murder of Sneed and

1 firearm possession charges are easily understood without having to present the
2 litany of other crimes committed by other people. In fact, presenting the unrelated
3 crimes would have the opposite effect and instead confuse the issues.

4 The government further seeks to introduce evidence under Fed. R. Evid.
5 404(b), which does not fall within its scope. Rule 404(b) prohibits the use of
6 character evidence to show conformity with that character, but allows its use for
7 other purposes “such as proving motive, opportunity, intent, preparation, plan,
8 knowledge, identity, absence of mistake, or lack of accident.” Under Ninth Circuit
9 law, this Court may only admit evidence of other bad acts if it “(1) tends to prove a
10 material point; (2) is not too remote in time; (3) is based upon sufficient evidence;
11 and (4) in some cases, is similar to the offense charged.” *United States v.*
12 *Robertson*, 15 F.3d 862, 870 (9th Cir. 1994). Moreover, the government must
13 “articulate precisely the evidential hypothesis by which a fact of consequence may
14 be inferred from the other acts evidence.” *Mayans*, 17 F.3d at 1181. The acts listed
15 in the government’s Rule 404(b) disclosure consist of acts committed by third
16 parties, not the group of defendants being tried together. The acts of third parties
17 could not in any way be probative of the defendants’ motive, opportunity, intent,
18 preparation, plan, knowledge, identity, absence of mistake, or lack of accident.
19 Nor do they prove a material point with respect to the crimes charged. Some of the
20 prior acts took place as long ago as 2000, 2008, and 2009. Most of the prior crimes
21 have any similarity to the crimes charged. Accordingly, they should not be
22 admitted under Rule 404(b).

23 Finally, the other acts evidence must also satisfy the Rule 403 balancing test
24 – its probative value must not be outweighed by the danger of unfair prejudice,
25 confusion of the issues, undue delay, waste of time, or needless presentation of
26 cumulative evidence. As this Court noted in its December 30, 2015 order when it
27 grouped this case into two trials, “with a smaller number of defendants in each
28 reduces any potential prejudice and may obviate any *Bruton* issues.” Allowing

1 evidence of crimes committed by others who are not being tried will defeat that
2 purpose. Worse, the defendants being tried will be tasked with defending the
3 crimes of others. Finally, as the government's Consolidated Statement Regarding
4 Additional Acts the Government Intends to Introduce at Trial (Document 851)
5 shows, it lists crime after crime of the same repetitive conduct committed by
6 various people. All of it is cumulative, prejudicial, and not in any way material to
7 any of the crimes charged.
8

9 **C. MOTION IN LIMINE TO EXCLUDE MUG SHOTS (EXHIBITS 85, 466, 467, 554,**
10 **590, 591, 592, 603, 1086, 1210, ETC.)**

11 This court should exclude any and all evidence of mugshots (whether
12 belonging to defendants or third parties) because of the clear implication of
13 criminality or associating with criminals. Indeed, courts recognize the "grave risk"
14 of prejudice in the introduction of mugshots because they would lead the jury to
15 believe that the subject was a police character with a criminal record. *United States*
16 *v. Carrillo-Figueroa*, 34 F.3d 33, 40 (1st Cir. 1994); *see, United States v. Watts*,
17 532 F.2d 1215, 1217 (8th Cir. 1976). Mugshots "carry a clear implication of
18 criminal activity that breaches the rule against admitting evidence of the
19 defendant's bad character or brushes with the law." *United States v. Hines*, 955
20 F.2d 1449, 1455 (11th Cir. 1992), citing *Barnes v. United States*, 365 F.2d 509, 510
21 (D.C. Cir. 1966) (noting the prejudicial effect of mugshots) and *United States v.*
22 *Reed*, 376 F.2d 226, 228 n.7 (7th Cir. 1967) (same). As such, even if admissible
23 under the Federal Rules of Evidence, the First, Fifth Circuit, and 11th Circuits have
24 adopted "very strict standards" relating to the admissibility of mugshots: (1) The
25 government must have a demonstrable need to introduce the photographs; (2) the
26 photographs must not imply that the defendant has a criminal record; and (3) the
27 manner of introduction at trial must not draw attention to the source or implications
28 of the photographs. *Id.* at 1455-1456; *United States v. Carrillo*, 20 F.3d 617, 620
(5th Cir. 1994); *Carrillo-Figueroa*, 34 F.3d at 40.

1 The mugshots in the present case do not satisfy the standards for admissibility
2 under the Federal Rules of Evidence, let alone the foregoing stricter standards. The
3 mugshots are not relevant because they do not make the existence of any
4 consequential fact more or less probable. No identification issues exists. Under the
5 above standards, the government has not demonstrate any need for them.
6 Moreover, the manner in which mugshots are taken make them easily recognizable
7 as such and they do imply a criminal record. The mushots should also be excluded
8 under 403 because the government seeks to introduce mugshots of individuals who
9 are not even tried with Mr. Gilton's group of defendants. These prejudicial photos
10 will only serve to confuse the issues, prejudice the defendants based on guilt by
11 association, cause undue delay and waste of time, and needless presentation of
12 cumulative evidence, especially based on the numerous mugshots that the
13 government intends to introduce
14

15 **D. MOTION IN LIMINE TO EXCLUDE ANY EVIDENCE RELATING TO OR**
16 **REFERENCING MICHAEL NORTHCUTT (GOVERNMENT EXHIBIT LIST 27,**
17 **226, 227)**

18 Undersigned counsel for Mr. Gilton, previously represented Michael
19 Northcutt in *United States v. Northcutt*, 07-00669-SI, which involved a felon in
20 possession of firearm and crack cocaine distribution case at or around same time as
21 many of the allegations in the current Indictment. When Mr. Northcutt's name first
22 began to appear in discovery last year, undersigned counsel gave notice to the
23 government regarding the potential conflict. At that time, both parties agreed that
24 there was no conflict. Recently, however, the government's gang expert testified,
25 Sgt. Damon Jackson implied that Mr. Northcutt is a CDP gang member. Further,
26 Mr. Northcutt's name has appeared in the government's exhibit list. It is clear that
27 the government believes that Mr. Northcutt was a CDP gang member. In order to
28 avoid any conflict of interest in undersigned counsel's previous representation of
Mr. Northcutt, Mr. Gilton requests that this Court exclude any evidence relating to
Mr. Northcutt.

1 Dated: April 8, 2016

2 /s/
TAMOR & TAMOR
Attorneys at Law
3 By: Richard Tamor
4 Counsel for Barry Gilton
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